IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 636 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

HON'BLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHAMAN KESHABHAI PARMAR - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :

Ms Shahin Pathan for MR GA PATHAN for appellant.

MR KT DAVE, A.P.P. for Respondent.

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CORAM :HON'BLE MR.JUSTICE J.M.PANCHAL
& HON'BLE MR.JUSTICE H.B.ANTANI

Date : 18/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated June 2, 1999, rendered by the learned Additional Sessions Judge, Court No.13, Ahmedabad, in Sessions Case No.213 of 1996,

by which the appellant is convicted under Sections 363, 366 & 376 of the Indian Penal Code and sentenced to suffer R.I. for three years and fine of Rs. 1000/-, in default, S.I. for 15 days for commission of offence punishable under Section 363 I.P.C. as well as R.I. for four years and fine of Rs.2000/-, in default, S.I. for one month for commission of offence punishable under Section 366 I.P.C. and R.I. for eight years and fine of Rs.2000/-, in default, S.I. for one month for commission of offence punishable under Section 376 I.P.C. It may be stated that the learned Judge of the trial Court has directed that substantive sentences shall run concurrently.

2. This is a case under Section 376 I.P.C. and, therefore, in view of the decision in the case of **State of Punjab v. Ram Dev, 2003 A.I.R. SCW 6947**, this Court has refrained from mentioning the name of the victim.

3. The facts emerging from the record of the case are as under :

Complainant Bachubhai Shantibhai Vaghela is residing at Pathan's Chawl, Guptanagar, Vasana, Ahmedabad with his family. He is doing work as a Safai-Kamdar. He has two sons and two daughters. The elder daughter of the complainant, namely, Puriben is married. On the day of incident, which is January 11, 1996, the age of the victim was 14 years and 6 months. On that day, the complainant returned home after doing his work. He found that his two sons and victim were not present and the room was locked from outside. He learnt that key of the lock was handed over to the neighbour and, therefore, he collected key and opened his room. Thereafter he made search of the victim. He came to know that the appellant had relations with the victim and that prior to the incident, they were moving together. In view of receipt of this information, the

complainant doubted that the victim must have been taken by the appellant. He, therefore, inquired about the appellant, but, the appellant was not found present at his residence. The sister of the appellant i.e. Taraben informed the complainant that in the morning at about 8.00 A.M. the appellant left home wearing clean nice dress. The complainant was convinced that the appellant took or enticed his minor daughter out of her keeping of lawful guardian with intent that she might be compelled, or knowing it to be likely that she would be compelled to marry with him against her will and she would be forced or seduced to illicit intercourse. Therefore, he lodged complaint with Vejalpur Police Station. On the basis of complaint filed by Bachubhai, C.R.No.I.15/96 under Sections 363 & 366 I.P.C. was registered against the appellant and investigation was started. The investigating agency made search about the appellant and the victim at Gandhidham, Deesa and other places, and recorded statements of several persons. An information was received from Aagthada Police Station that the appellant and the victim were traced by the police personnel of that Police Station. Therefore, policeman was deputed to bring the appellant and the victim at Vejalpur Police Station. At Vejalpur Police Station, statement of the victim was recorded which indicated commission of offence by the appellant punishable under Section 376 I.P.C. Therefore, offence under Section 376 I.P.C. was added to the complaint lodged by Bachubhai. The victim was thereafter sent to Civil Hospital, Ahmedabad with a yadi for treatment. The clothes put on by the appellant were seized under a panchnama. The muddamal seized during the course of investigation was sent to Forensic Science Laboratory for analysis. The appellant was arrested on January 21, 1996. On completion of investigation, the appellant was chargesheeted in the Court of learned Metropolitan Magistrate, Ahmedabad for commission of offences punishable under Sections 363, 366 & 376 I.P.C. As the offences punishable under Sections 366 & 376 I.P.C. are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Ahmedabad

for trial, where it was numbered As Sessions Case No.213 of 1996.

4. The learned Additional Sessions Judge, to whom the case was made over for trial, framed necessary charge against the appellant at Exh.1. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) the victim as PW.1 at Exh.6, (2) complainant Bachubhai Shantibhai Vaghela as PW.2 at Exh.7, (3) Joitaram Jesangbhai Chaudhary as PW.3 at Exh.10, (4) PSI Laxmansinh Raijibhai Baria as PW.4 at Exh.21, (5) PSI Bhalchandra Baburao Kadave as PW.5 at Exh.23, (6) investigating officer Thavraji Rupaji Barot as PW.6 at Exh.24, (7) investigating officer Uday Narendrakumar Malavi, (8) Dr.Vinodkumar Lajjaram Gupta as PW.8 at Exh.29, (9) Dr.Rameshchandra Bhagubhai Shah as PW.9 at Exh.34, and (10) P.I. Mr.A.G.Munshi as PW.10 at Exh.36, to prove its case against the appellant. The prosecution also produced documentary evidence such as complaint lodged by Bachubhai Shantibhai Vaghela at Exh.8, report of P.S.O. at Exh.22, school leaving certificate of the victim at Exh. 27, birth-certificate of the victim at Exh.13, panchnama indicating physical condition of person of the appellant and seizure of clothes put on by him at Exh.16, the message received from Palanpur at Exh.25, certificate issued by Civil Hospital after examining the appellant at Exh.32, certificate issued by Civil Hospital, Ahmedabad on examination of the victim at Exh.35, forwarding letter with which the muddamal was sent to F.S.L. for analysis at Exh.17, report of F.S.L. at Exh.19, report requisitioning services of woman constable at Exh.20, original school leaving certificate at Exh.12, handwritten school leaving certificate of the victim at Exh.14, medical papers recording history of the incident as stated by the appellant before the Doctor at Exh.31 etc. in support of its case against the appellant.

5. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the case of the appellant was that a false case was lodged against him. However, no defence evidence was led by him.

6. On appreciation of evidence adduced by the prosecution, the learned Judge held that at the time of incident, age of the victim was 14 years, 7 months & 12 days. The learned Judge came to the conclusion that the appellant enticed minor victim, who was under 16 years of age, out of keeping of her lawful guardian and he, therefore, committed offence of kidnapping punishable under Section 363 I.P.C. The learned Judge found that the appellant had sexual intercourse with the victim, and held that the victim was kidnapped with intent that she would be compelled, or knowing it to be likely that she would be compelled or forced or seduced to illicit intercourse and, therefore, the appellant was liable to be convicted under Section 366 I.P.C. The learned Judge noticed testimony of the victim as well as that of the Medical Officer, and found that the appellant had sexual intercourse with the victim who was only 14 years of age and, therefore, the appellant was liable to be convicted under Section 376 I.P.C. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Sections 363, 366 & 376 I.P.C. and imposed sentences referred to earlier by judgment dated June 2, 1999, giving rise to instant appeal.

7. Ms.Shahin Pathan for Mr.G.A.Pathan, learned counsel of the appellant, contended that extra judicial confession made

by the appellant before the Doctor could not have been relied upon for the purpose of convicting the appellant under Sections 363, 366 & 376 I.P.C., and therefore, his unwarranted conviction deserves to be set aside. It was argued that the learned Judge committed an error in holding that the victim was below 15 years of age, more particulars when no birth-certificate from Jagasan Gram Panchayat could be produced and, therefore, the impugned judgment deserves to be set aside. It was argued that the testimony of Mr.Chaudhary, who was Principal in Municipal School No.1, Vasana, makes it evident that no birth certificate of the victim was produced at the time of her admission in the school and, therefore, school leaving certificate should not have been relied upon for the purpose of coming to the conclusion that the victim was below 16 years of age at the time of incident. The learned counsel maintained that during medical examination of the victim, no external injury was found on her private part, whereas rupture of hymen was found to be old and that her vagina admitted two fingers and, therefore, it should have been held that she was habituated to sexual intercourse and no rape on her was committed by the appellant. The learned counsel stressed that evidence on record is not properly appreciated by the learned Judge of the trial Court in its true perspective and, therefore, the appeal should be allowed.

8. Mr.K.T.Dave, learned A.P.P. for the State, argued that the testimony of the victim recorded at Exh.6 makes it evident that her birth had taken place at Dadusar, whereas the school leaving certificate and birth certificate indicate that her date of birth was May 30, 1981, and as the incident had taken place on January 12, 1996, the learned Judge of the trial Court did not commit any error in concluding that the age of the victim on the day of the incident was 14 years, 7 months & 12 days. According to the learned A.P.P., testimony of father of the victim, who is also complainant, recorded at Exh.7,

makes it evident that the appellant enticed and removed the victim from keeping of her lawful guardian with intent to have sexual intercourse with her and, therefore, conviction of the appellant under Sections 363 & 366 I.P.C. cannot be regarded as erroneous. What was asserted before the Court by the learned A.P.P. for the State was that the testimony of the victim read with that of Dr.Rameshchandra B.Shah recorded at Exh.34 indicates that the appellant had sexual intercourse with the victim and, therefore, well-founded conviction of the appellant under section 376 I.P.C. should be upheld by this Court. The learned A.P.P. for the State argued that the extra judicial confession made by the appellant admitting that he had sexual intercourse with the victim four times is not hit by any of the provisions of the Evidence Act, and as confession was made voluntarily before the Doctor, the same is rightly taken into consideration while considering guilt or otherwise of the appellant. The learned counsel pointed out that even if the Court comes to the conclusion that the victim was a consenting party to sexual intercourse with her, the appellant has committed rape on her which is quite evident from the statutory provisions of Section 375 I.P.C. and therefore, judgment impugned in the appeal should be affirmed. The learned counsel of the State Government contended that cogent and convincing reasons have been given by the learned Judge of the trial Court for convicting the appellant under Sections 363, 366 & 376 I.P.C. and as the learned Judge of the trial Court has failed to dislodge them, the appeal, which lacks merits, should be dismissed by this Court.

9. This Court has heard Mr.G.A.Pathan, learned counsel of the appellant and Mr.K.T.Dave, learned A.P.P. for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

10. The fact that the date of birth of the victim is May 30, 1981 can hardly be disputed. Complainant Bachubhai, in his substantive evidence before the Court, has stated that the victim was born on May 30, 1981. The prosecution has produced a copy of school leaving certificate of the victim at Exh.12 issued by the Principal, Vasana School No.1, Nagar Prathmik Shikshan Samiti, Ahmedabad. It indicates that her date of birth was May 30, 1981, Again, the certificate issued by the Principal of the said School and produced at Exh.13 on the record of the case makes it evident that the date of birth of the victim was May 30, 1981. Similarly, Exhs.14 & 27 establish that the date of birth of the victim was May 30, 1981. The learned Judge of the trial Court has recorded cogent and convincing reasons for coming to the conclusion that the date of birth of the victim was May 30, 1981 and that on the day of incident, she was below 16 years of age. Those reasons are to be found in para-5 of the impugned judgment with which this Court fully concurs. Therefore, the finding that the victim was born on May 30, 1981 is not liable to be interfered with in instant appeal. As far as commission of offences punishable under sections 363, 366 & 376 I.P.C. is concerned, this Court finds that commission of those offences by the appellant stands amply proved by the testimony of the victim which is recorded at Exh.6. The victim has mentioned before the Court that she used to visit house of her cousin Taraben and as the appellant is brother of Taraben, she came in contact with the appellant. It is further stated by the victim that before few days of the incident, her mother was not keeping good health and was admitted in Vejalpur Hospital for treatment and when she was all alone in the house, the appellant had approached her and enticed her to go with him on the pretext that her mother was serious and he was taking her to her mother. The victim has further stated that the appellant had taken her with him at Gandhidham, District : Kutch, and she had resided in the house of Taraben at Gandhidham. She has further mentioned that in the

house of Taraben, the appellant had sexual intercourse with her. Though the victim is cross-examined searchingly and in detail, nothing could be brought on record to impeach her credibility. The victim has proved that she was enticed by the appellant and that the appellant removed her from keeping of her lawful guardian with an intent to have sexual intercourse with her. The commission of offences punishable under Sections 363 & 366 I.P.C. also stands proved by the testimony of the complainant. Under the circumstances, no exception can be taken to the conviction of the appellant under Sections 363 & 366 I.P.C. The same will have, therefore, to be upheld.

11. As far as commission of offence punishable under section 376 IPC is concerned, this Court notices that the victim has asserted before the Court that the appellant had sexual intercourse at the house of his sister Taraben situated at Gandhidham. This assertion could not be demonstrated to be false. After arrest, the appellant was subjected to medical examination . He was examined by Dr.Vinod Gupta. Before examining him, the Doctor had recorded history and it was stated by the appellant in Hindi language that he was in love with the victim since nine months and that he had sexual intercourse with her four times, with her consent. This statement made by the appellant before the Doctor is rightly taken into consideration by the learned Judge of the trial Court while deciding guilt or other of the appellant. The history narrated by the appellant stands amply proved by Dr.Vinodkumar Gupta whose evidence is recorded at Exh.29. The case of the appellant that Dr.Gupta had recorded false history is rightly rejected by the trial Court, because Dr.Gupta was not knowing the appellant at all prior to his production before him for medical examination. He had no reason to concoct a false record against the appellant. Therefore, history being relevant record, cannot be ignored by the Court. Section 375 IPC, inter alia, provides that a man is said to commit rape if he has sexual intercourse with a woman, with or without her consent, when she is under 16 years of age. Having regard to

the facts of the case, there is no manner of doubt that Clause Sixthly of Section 375 IPC would apply to the facts of the case and that sexual intercourse by the appellant with the victim will have to be regarded as rape on her, as the victim was below 16 years of age at the time of incident. Under the circumstances, conviction of the appellant under Section 376 IPC also will have to be upheld. The sentences imposed cannot be considered to be harsh or excessive, more particularly when substantive sentences are ordered to run concurrently. The net result of above discussion is that this Court does not find any substance in instant appeal and, therefore, the same deserves to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

(patel)